ORDER OF THE COURT (Fifth Chamber)

7 April 2011 *

In Case C-519/09,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Arbeitsgericht Wuppertal (Germany), made by decision of 19 November 2009, received at the Court on 14 December 2009, in the proceedings

Dieter May

v

AOK Rheinland/Hamburg — Die Gesundheitskasse,

THE COURT (Fifth Chamber),

composed of J.-J. Kasel, President of the Chamber, E. Levits (Rapporteur) and M. Safjan, Judges,

Advocate General: V. Trstenjak,
Registrar: A. Calot Escobar,

* Language of the case: German.

the Court proposing to give its decision by reasoned order in accordance with Article 104(3), first subparagraph, of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

2 The reference has been made in the context of proceedings between Mr May and his former employer, AOK Rheinland/Hamburg — Die Gesundheitskasse [Rheinland/Hamburg General Local Health Insurance Fund ('AOK')], regarding the payment of financial compensation in lieu of a number of days of paid annual leave which he was unable to take in the course of 2006 and 2007.

Legal context

European Union legislation

3 Article 1 of Directive 2003/88 provides follows:

‘Purpose and scope

1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods … of annual leave …

…

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC [of the Council, of 12 June 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183 p. 1)], without prejudice to Articles 14, 17, 18 and 19 of this Directive.

…’

4 Article 7 of that directive is worded as follows:

‘Annual leave

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.’

5 Article 17 of Directive 2003/88 provides that the Member States may derogate from some provisions of that directive. Derogation from Article 7 of that directive is not permitted.

6 The ambit of Directive 89/391 is set out in its Article 2, which refers back to Article 1(3) of Directive 2003/88. In the words of Article 2:

‘1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

… ’

National legislation

7 The regulation concerning the holiday leave of public servants and judges in the Land North Rhine-Westphalia; ‘the EUV’ (Verordnung über den Erholungsurlaub der Beamtinnen und Beamten und Richterinnen und Richter im Lande Nordrhein Westfalen — Erholungsurlaubsverordnung), in the version of 14 September 1993, provides in Paragraph 8:

‘As far as possible, holiday leave shall be taken fully during the leave year. Upon request, leave is to be granted in parts; however, as a general rule division into more than two parts shall be avoided.

Leave that has not been taken within nine months of the end of the leave year shall be forfeited. [In case of commencement or termination of public-servant status in the course of the leave year], entitlement to leave shall not lapse until the end of the following year.’

8 The staff regulations for the employees of AOK Rheinland (Dienstordnung für die Angestellten der AOK Rheinland), in the version of 1 January 1999, provides in Paragraph 20(1):

'Unless provided otherwise by specific legislation or in these staff regulations, the relevant provisions for public servants of the *Land* shall apply by analogy or *mutatis mutandis* to employees and pensioners as regards:

…

(f) leave.'

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Mr May was employed by AOK from 1 April 1966 to 31 March 2009. For most of the period from 24 April 2006 until leaving his post on 31 March 2009, he was unable to work for health reasons.

10 Mr May took paid annual leave for the years 2008 and 2009.

11 In his action before the Arbeitsgericht Wuppertal (Labour Court, Wuppertal), Mr May claims financial compensation in lieu of 11 days' annual leave from 2006 and 28 days' annual leave from 2007 that he was unable to take.

12 AOK contends that the application should be dismissed. It considers that an employee ('Angestellter') of the Land North Rhine-Westphalia health fund subject to staff regulations ('Dienstordnung') is paid and therefore compensated as a civil servant of that Land who, according to national legislation, is not entitled to financial compensation in lieu of annual leave upon termination of the employment relationship.

13 The referring court is of the view that an entitlement to such financial compensation in lieu of annual leave arises from Article 7(1) and (2) of Directive 2003/88 if the meaning of the term 'worker' to which it refers, also includes an employee subject to staff regulations like those that apply to the applicant in the main proceedings.

14 In those circumstances, the Arbeitsgericht Wuppertal decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the concept of worker within the meaning of Article 7(1) and (2) of Directive 2003/88/EC … also cover an employee subject to staff regulations (Dienstordnungsangestellter) in a body governed by public law whose autonomous regulations issued on the basis of authorisation under federal legislation … refer, in respect of the holiday entitlement of such an employee, to the provisions applicable to public servants … [in the Land North Rhine-Westphalia]?'

The question referred for a preliminary ruling

15 In accordance with the first subparagraph of Article 104(3) of the Rules of Procedure of the Court of Justice, when the answer to a question may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order in which reference is made to the relevant case-law.

16 That provision must be applied in the present case.

17 By its question, the referring court asks, in essence, whether the concept of 'worker' for the purpose of Article 7 of Directive 2003/88 covers an employee of a body governed by public law in the social security sector subject, in particular as regards his entitlement to paid annual leave, to the rules applicable to civil servants.

18 In that regard, it must be borne in mind, first, that in accordance with Article 1(3) of Directive 2003/88, in conjunction with Article 2 of Directive 89/391, to which it refers, those directives apply to all areas of activity, private and public, in order to encourage improvements in the safety and health of workers at work and to regulate certain aspects of the organisation of their working time.

19 Accordingly, the Court has already decided that the ambit of Directive 89/391 must be conceived in broad terms, so that the exceptions to its ambit under the first subparagraph of Article 2(2) must be interpreted restrictively (see, to that effect, in particular, Case C-303/98 *Simap* [2000] ECR I-7963, paragraphs 34 and 35, and Case C-132/04 *Commission* v *Spain* [2006] ECR I-0003, paragraph 22). Those exceptions

were adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases, the gravity and scale of which are exceptional (Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 55).

20 None of those circumstances being relevant as regards an employee who finds himself in a situation such as that of the applicant in the main proceedings, the activity of such an employee falls within the ambit of Directive 2003/88.

21 It must be borne in mind that according to settled case-law, the concept of 'worker' within the meaning of Article 45 TFEU is independent in scope and must not be interpreted narrowly. Any person who pursues activities that are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, Case 138/02 *Collins* [2004] ECR I-2703, paragraph 26 and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 15).

22 This information, given by the Court as regards the concept of 'worker' within the meaning of Article 45 TFEU, applies in respect of the same concept used in the legislative measures referred to in Article 288 TFEU too (see, to that effect, Case C-94/07 Raccanelli [2008] ECR I-5939, paragraph 27).

23 In that regard, it must be stated that there is nothing in the order for reference to cast doubt on the fact that the employment relationship between Mr May and his employer, AOK, displayed the characteristics of an employment relationship as set forth in paragraph 21 of this order.

24 Finally, although it follows from all the foregoing that the question submitted for a preliminary ruling calls for an affirmative answer, it should be pointed out that the Court has already decided that, there being no distinction in the exception referred to in Article 45, paragraph 4, concerning employment in the public service, it is of no interest whether a worker is engaged as a workman (ouvrier), a clerk (employé), or an official (fonctionnaire) or even whether the terms on which he is employed come under public or private law. These legal designations can be varied at the whim of national legislatures and cannot, therefore, provide a criterion for interpretation appropriate to the requirements of European Union law (see Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 5).

25 Consequently, and for the sake of completeness, it is to be pointed out that the Court has explicitly held that a German university professor is, irrespective of his civil servant status conferred on him by national law, a worker within the meaning of Article 45 TFEU (see, to that effect, the order of 10 March 2005 in Case C-178/04 *Marhold*, paragraph 19).

26 In the light of all the foregoing, it must be concluded that it is clear from the case-law of the Court that an employee in a body governed by public law such as the applicant in the main proceedings is a 'worker' within the meaning of Article 7 of Directive 2003/88.

27 Consequently, the answer to the question is that, on a proper construction of Article 7(1) and (2) of Directive 2003/88, the concept of 'worker' includes an employee

of a body governed by public law in the social security sector subject, in particular as regards his entitlement to paid annual leave, to the rules applicable to civil servants.

Costs

28 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

On a proper construction of Article 7(1) and (2) of Directive 2003/88 of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, the concept of 'worker' includes an employee of a body governed by public law in the social security sector subject, in particular as regards his entitlement to paid annual leave, to the rules applicable to civil servants.

[Signatures]